MALAYAN BANKING BERHAD

v.

LIM TEE YONG & 3 ORS.

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[GUAMAN SIVIL NO. 22-09-93]
8 MAY 1994

PRACTICE & PROCEDURE: Affidavits - Filing - Order 32 r. 13(2)(b) RHC 1980 - Non-compliance - Whether fatal - Affidavit in reply filed and served out of time - Delay not explained - Extension of time to file and serve not applied for - Whether affidavit to be disregarded.

PRACTICE & PROCEDURE: Summary judgment - Order 14 RHC 1980 - Statement of defence - Allegation of fraud - Averments of fraud made in general terms -Whether a sufficient defence.

The defendants were partners of a firm known as Eng Hup Seng Ricemill and Trading Company (the firm). The plaintiff granted the firm an overdraft facility and consequently claimed from the defendants RM1,156,598.78 being the facility amount which the firm had over-utilised in breach of the condition thereof. The plaintiff obtained a default judgment against the first defendant and applied for summary judgment against the other three defendants.

At the commencement of the hearing both the plaintiff and the defendants raised a preliminary objection each pertaining to the validity of the affidavits they had respectively affirmed pursuant to this application. The facts showed that the plaintiff had filed four supporting affidavits including one "affidavit in reply" (encl. 23) which it served on the defendants on 8 February 1994. Encl. 23, however, was a reply to the defendants' affidavit (encl. 19) which the defendants served on the plaintiff on 5 November 1993. The defendants, on the other hand, had affirmed three affidavits including an "additional affidavit in reply" (encl.28) which they served on the plaintiff on 5 May 1994. This encl.28 was a reply to the plaintiff's "additional affidavit" (encl. 27) which the plaintiff served on the defendants on 21 February 1994.

The plaintiff objected to the admissibility of encl. 28 on the ground that service of that affidavit was not in compliance with O. 32 r. 13(2)(b) Rules of The High Court 1980, while the defendants, on like ground, objected to encl. 23. The defendants, however, had the chance to object when the case first came up for hearing on 26 February 1994, but for reasons only known to them, had not chosen to do so on that day.

In their affidavits and statement of defence the defendants alleged that the plaintiff had committed fraud on them. The facts showed that in alleging fraud thus, the defendants had not been specific and the particulars of fraud which they had set out in their statement of defence, doubtless, were vague and general. The issues that arose were:

(1) Whether the delay by the plaintiff and the defendants in serving their respective affidavits in encls. 23 and 28 had vitiated the validity of those affidavits and if so, whether by reason of their failure to raise the objection earlier on 26 February 1994, the defendants had been estopped from objecting to the validity of the said encl. 23 of the plaintiff.

(2) Whether the plaintiff was under an obligation to issue the defendants a notice of demand, and if so, whether the defence, by their allegation that the plaintiff had failed to issue such notice, had succeeded in raising a triable issue on the question as to whether or not the plaintiff had served the defendants with such notice.

(3) Whether the defence had succeeded in raising a triable issue on their allegation of fraud against the plaintiff.

Held:

[1] Encl. 28 of the defendants, in the circumstances of this case, ought to be disregarded. Apart from what Counsel for the defendants said that the delay was attributable to the difficulty he had in getting a certain Penang High Court writ of summons which he needed for the purpose of the affidavit, there was no material before the Court on which the Court could exercise its discretion in favour of the defendants. Not only was the delay substantial,the defendants had not applied to this Court for an extension of time to file and serve the affidavit, nor, at the very least, did the affidavit in question itself account for the delay for the Court to consider.

[2] The objection by the defendant's solicitor that the service by the plaintiff of encl. 23 was also not in compliance with O. 32 r. 13(2)(b) cannot be upheld. Although the affidavit in encl. 23 was served on the defendant outside the 14 day period, the facts showed that when the case first came up for hearing on 26 February 1994, the solicitor for the defendant did not object to the affidavit but had instead only asked for a postponement to enable the defendants to file an affidavit in reply. The defendants, by failing to object and by seeking an adjournment with the view of filing an affidavit in reply, had, on that day, waived his right to object to the non-compliance with the rule by the plaintiff in respect of that affidavit.

[3] In view of the words "Repayable on demand as and when the bank deems fit" in paragraph 3 of each of the two letters of offer of the overdraft facility, and in view further of the decisions of the Supreme Court in *Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd.* and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad*, a notice of demand must be served on each of the defendants as a condition to suing them. However a reference to paragraph 7 of the statement of claim and para 11 of the statement of defence shows that the defendants were in fact served with the notice of demand and that they had chosen to ignore it.

[4] The so-called particulars of fraud as set out in the statement of defence are vague and general. For one thing the banker with whom the first defendant was alleged to have perpetrated fraud on the defendants had not been disclosed or identified by name. That apart, the question of false representation, an ingredient of fraud, had not been specifically addressed with the result that the Court was in the dark as by whom and to whom the false representation was made. In the circumstances the allegations of fraud herein serve no purpose at all. Such vague and general averments of fraud are insufficient as defence.

[Application allowed].

Cases referred to:

Government of State of Pahang v. Tengku Abdul Aziz & Anor. [1978] 2 MLJ 34 ***(refd)***

Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd. [1987] CLJ 197/[1987] 2 MLJ 610 ***(foll)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad [1989] 3 MLJ 155 ***(foll)***
Derry v. Peek [1889] 14 AC 337 ***(refd)***
Barclays Bank Ltd. v. Cole [1967] 2QB 738 ***(refd)***
Newton Chemical ltd. v. Arsenis [1989] 1 WLR 1297 ***(cit)***
Wallingford v. Mutual Society [1879-80] 5 AC 685

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 13(2)(b)

For the plaintiff - Lor chin Yoon; T/n. Hoe & Ahmad Zaki
For the defendant - Tan Lip Gay; T/n. Leong Ng & Tan

JUDGMENT

Mohd Hishamudin Bin Mohd Yunus JC:
This is an application by the plaintiff for summary judgment against the second, third and fourth defendants pursuant to O. 14 of the Rules of the High Court (default judgment had already been obtained against the first defendant).

All the defendants are partners of a partnership known as "Eng Hup Seng Ricemill and Trading Company."

The plaintiff, in its statement of claim, avers that it had granted the partnership with an overdraft facility and that as of 31 October 1992, the partnership, in breach of the condition of the facility, had exceeded the limit of RM800,000 by RM356,598.78. Despite being reminded by the plaintiff to regularise the account, the defendants had failed to do so. Accordingly, the plaintiff served each of the defendants with a letter of demand demanding that the amount of RM1,156,598.78 be paid within fourteen days. The defendants failed to comply. By this action, the plaintiff claims for the said amount.

In support of its application, the plaintiff filed four affidavits, that is to say:

(a) the affidavit of Abdul Hamid bin Ku Saad affirmed on 23 August 1993 (enclosure 14);

(b) the affidavit ("afidavit pembetulan") of Abdul Hamid bin Ku Saad affirmed on 28 October 1993 (enclosure 15);

(c) the affidavit ("afidavit balas") of Abdul Hamid bin Ku Saad affirmed on 2 February 1994 (enclosure 23); and

(d) the affidavit ("afidavit tambahan") of Abdul Hamid bin Ku Saad affirmed on 21 February 1994 (enclosure 27).

In opposing the application, the defendants filed their statement of defence and the following three affidavits:

(a) the affidavit of Lim Tee Keng affirmed on 5 November 1993 (enclosure 19);

(b) the affidavit of Lim Tee Keng ("afidavit balasan") affirmed on 6 January 1994 (enclosure 21);and

(c) the affidavit ("afidavit balasan tambahan") affirmed by Lim Tee Keng on 29 April 1994 (enclosure 28).

The affidavit in enclosure 19 adopts the statement of defence.

At the commencement of this hearing, two preliminary issues were raised. I shall deal with these procedural issues first. First, the learned Counsel for the plaintiff, Encik Lor Chin Yoon, objected to the defendants' affidavit in enclosure 28. This objection was based on O. 32 r. 13 (2)(b) of the Rules of the High Court which provided:

> (O. 32, r. 13)(2) Save as otherwise provided in these rules:
>
> (a) ...
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party with in 14 days from the date on which the affidavit he intends to reply was served on him.

According to Encik Lor, enclosure 28 was filed and served on him only on 5 May 1994 whereas plaintiff's affidavit (enclosure 27) was served on the defendants' solicitor much earlier, that is, on 21 February 1994. The learned Counsel for the defendants, Encik Tan Lip Gay, in reply, admitted the delay but said that he had difficulty in getting from his clients a Penang High Court writ of summons no.22-169-93, which is needed for the purpose of the affidavit (enclosure 28), and argued that the delay did not in any way prejudice the plaintiff. He urged me to exercise my discretion to allow enclosure 28 to be used in the proceeding. At the outset I must say that on a technical issue such as this I am always reminded by what was said by Ong Hock Sim F.J. in *Government of State of Pahang v. Tengku Abdul Aziz & Anor.* [1978] 2MLJ at page 34:

> We are inclined to the view that justice would not be served by acceding to objections on technicalities for non-compliance.

At the same time, however, I am also of the view that litigants should not treat rules of procedure lightly. Nor should they take the Court for granted. Any litigant who neglects to adhere strictly to the rules of procedure do so at his own peril. Although generally the Court has a discretion to allow an affidavit to be used despite there being a clear non-compliance with O. 32, r. 13(2)(b), nevertheless, in the present case, I upheld the objection and ruled that enclosure 28 be disregarded. To my mind, it would not have been a proper exercise of discretion on my part to allow the affidavit. There had been a substantial delay. Moreover, apart from what was said by Encik Tan as the delay, there was no material before the Court on which I could exercise my discretion in favour of the defendants. They had not formally applied to this Court for an extension of time to file and serve the affidavit; nor, at the very least, did the affidavit in question itself (i.e. enclosure 28) account for the delay for the Court to consider.

The other issue was the objection raised by Encik Tan. He objected to plaintiff's enclosure 23 on the ground that the service of this affidavit by the plaintiff was also not in compliance with O. 32 rule 13(2)(b). According to him, enclosure 23, which is a reply to defendants' enclosure 19, was served on the defendants outside the fourteen day period; it was served only on 8 February 1994. Encik Lor, however, replied that when this case first came up for hearing on 26 February 1994, Encik Tan has not objected to the affidavit but instead had asked for a postponement to enable the defendants to file an affidavit in reply; and as such the defendants are now estopped from raising any objection under the rule. As Encik Lor's account of what transpired on 26 February was true, I had, accordingly, overruled the objection on the grounds that Encik Tan, by failing to object and by seeking an adjournment with the view of filing an affidavit in reply, had, on that day, waived his right to object to the non-compliance with the rule by the plaintiff in respect of enclosure 23.

I now move on to the substantive issues. Encik Lor, in his submission, argues on the several issues raised by the defendants in their affidavits and statement of defence. Encik Tan, on the other hand, submits only on two points, namely, the alleged failure on the part of the plaintiff to serve a notice of demand on each of the defendants, and on the issue of alleged fraud. In view of Encik Tan's submission, I propose to deal only on these two issues which I shall put them as follows:

(a) Was the plaintif, legally, under an obligation to issue the defendants with a notice of demand; and if the answer to this question is in the affirmative, have the defence succeeded in raising a triable issue on the question as to whether or not the plaintiff have served the defendants with such a notice?

(b) Have the defence succeeded in raising a triable issue on their allegation of fraud against the plaintiff?

As to issue (a) in view of the fact that the words **"Repayable on demand as and when the bank deems fit**" are present in paragraph 3 of each of the two letters of offer (of the overdraft facility) issued by the plaintiff to the partnership (see exhibit AH-2 of encl 14 and exhibit AH-7 of enclosure 15), and in view of the decisions of the Supreme Court in *Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd.* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155, I accept Encik Tan's contention that a notice of demand must be served on each of the defendants as a condition to suing them. However, as regards his contention that no notice were ever served on the defendants, with respect, upon reading the pleadings, I must disagree, and in this regard I refer to the paragraph 7 of the statement of claim and paragraph 11 of the statement of defence. Paragraph 7 of the statement of claim states:

> 11. Pada 11 November 1992, plaintif melalui peguamcaranya telah mengeluar dan menyampaikan notis tuntutan dan menuntut supaya mereka membayar kesemua baki pinjaman overdraf tersebut sebanyak RM1,156,598.78 dalam masa 14 hari dari tarikh penyampaiannya tetapi defendan gagal mematuhi arahan notis tersebut.

And paragraph 11 of the statement of defence reads:

> 11. Berkenaan dengan perenggan 7 pernyataan tuntutan, defendan kedua, ketiga dan keempat amatlah terkejut dan tidak payahlah mengendahinya kerana ia merupakan suatu penipuan seperti juga ditunjukkan di atas.

It will be recalled that the defendants' affidavit, enclosure 19, adopts the statement of defence. From the above paragraphs it is clear that there is no dispute at all that the defendants were in fact served with the notice of demand and that they had chose to ignore it.

Finally, on the question of fraud. In the statement of defence it is alleged that the first defendant, who was the manager of the partnership, had committed fraud against the defendants, and it was committed in collusion with the manager of the plaintiff's bank and two individuals who provided the security for the overdraft. In the "particulars" of fraud it is averred, *inter alia*, that the first defendant alone had approached the said manager and had applied for the overdraft without the knowledge of the other defendants; that the facility was granted on the security of 80 pieces of land provided by a third party; that the chargors of the land were the two individuals mentioned earlier by the name of Lim Cheng Teik and Lim Beng Kee, who were directors of a company known as Sematang Jaya Sdn. Bhd.; and that the overdraft was for purposes "*ultra vires*" the partnership.

It is established law that the expression "fraud" means fraud in the technical sense as used in *Derry v. Peek* [1889] 14 App Cas 337, i.e. the tort of deceit: see B*arclays Bank Ltd. v. Cole* [1967] 2QB 738 and *Newton Chemical ltd. v. Arsenis* [1989] 1 WLR 1297. In *Barclays Bank*, the Court of Appeal held that robbery was not fraud. Lord Denning MR at page 744 said:

> ... in law "fraud" is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, careless whether it be true or false: see *Derry v. Peek* [1889] 14 App Cas 337, 374, per Lord Herschell. In any case, fraud involves a false representation.

It is my view that the so-called particulars of fraud as set out in the statement of defence are vague and general. For one thing, even the name of the bank manager (alleged to be in collusion with the first defendant) was not given. Then again, what was the alleged false representation, and by whom and to whom was the false representation made? Such vague and general averments of fraud are insufficient as defence. Indeed, they serve no purpose at all. On this point I find support in the passages in the judgments of Lord Selborne (Lord Chancellor) and Lord Hatherley in *Wallingford v. Mutual Society* [1879-80] 5 AC 685. Lord Selborne said (at page 697):

> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent...

At page 701 Lord Hatherley said:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

In any case, I am inclined to hold that the fraud story as inherently improbable. If the defendants were really serious about their allegation, why was there no police report lodged? And if indeed they are the victims of a fraudulent act committed by the first defendant in collusion with the plaintiff's manager, why did they choose not to reply and protest upon being served by the notice of demand by the plaintiff's solicitor?

In conclusion, it is my finding that there are no merits in the defence. The application for summary judgment is allowed.